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BANK OF INDIANA, its successors and/or assigns

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA - SACRAMENTO DIVISION

In re

TONY AREF SULEIMAN AND JENNIFER
LYNNE SULEIMAN,

Debtors.

Case No. 08-30141

Chapter 7

D.C. No. PD-1

MOTION FOR RELIEF FROM
AUTOMATIC STAY AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF
(11 U.S.C. § 362 and Bankruptcy Rule 4001)

NATIONAL CITY MORTGAGE CO., A
DIVISION OF NATIONAL CITY BANK OF
INDIANA, its successors and/or assigns,

Movant,

vs.

TONY AREF SULEIMAN AND JENNIFER
LYNNE SULEIMAN, Debtors; GARY
FARRAR, Chapter 7 Trustee,

Respondents.

LBR 4001-1 and 9014-1(f)(1)

DATE: September 30, 2008
TIME: 9:30 a.m.
CTRM: 35

501 "I" Street
Sacramento, CA 95814

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1 National City Mortgage Co., a division of National City Bank of Indiana, its successors
2 and/or assigns ("Movant"), moves this court for an order terminating the automatic stay of 11 U.S.C.
3 § 362 as to Movant, so that Movant may commence and continue all acts necessary to enforce its
4 security interest in real property generally described as 512 -512 1/2 Washington Ave, Bakersfield,
5 California 93308.

6 On or about July 24, 2008, Tony Aref Suleiman and Jennifer Lynne Suleiman ("Debtors")
7 filed a voluntary petition under Chapter 7 of the Bankruptcy Code, and Gary Farrar was appointed as
8 Chapter 7 Trustee. As a result of said filing, certain acts and proceedings against Debtors and the
9 bankruptcy estate are stayed as provided in 11 U.S.C. § 362.

10 Movant moves this court for relief from stay under 11 U.S.C. §§ 362(d)(1) and 362(d)(2).

11 **MEMORANDUM OF POINTS AND AUTHORITIES**

12 **I.**

13 **MOVANT IS ENTITLED TO RELIEF FROM THE**
14 **AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(2).**

15 **NO EQUITY**

16 11 U.S.C. § 362(d)(2) provides that relief from the automatic stay shall be granted if the
17 debtor does not have any equity in the property and the property is not necessary to the debtor's
18 effective reorganization.

19 In In re San Clemente Estates, 5 B.R. 605 (Bankr. S.D. Cal. 1980), the court stated that:

20 § 362(d)(2) reflects congressional intent to allow creditors to
21 immediately proceed against the property where the debtor has no
22 equity and it is unnecessary to the reorganization, even where the
debtor can provide adequate protection under § 362(d)(1). (Emphasis
added).

23 Id. at 610 (emphasis added).

24 In In re Mikole Developers, Inc., 14 B.R. 524, 525 (Bankr. E.D. Pa. 1981), the court stated
25 that in determining whether equity exists in the property for purposes of § 362(d)(2), all
26 encumbrances are totalled, whether or not all the lienholders have joined in the request for relief
27 from stay. The Ninth Circuit has concurred with this view in Stewart v. Gurley, 745 F.2d 1194 (9th
28 Cir. 1984).

1 An appropriate cost of sale factor should also be added to determine if the debtor has any
2 equity in the property. La Jolla Mortgage Fund v. Rancho El Cajon Associates, 18 B.R. 283, 289
3 (Bankr. S.D. Cal. 1982).

4 On or about May 9, 2007, Debtors, for valuable consideration, made, executed and delivered
5 to Movant a Note in the principal sum of \$196,000.00 (the "Note"). Pursuant to the Note, Debtors
6 are obligated to make monthly principal and interest payments commencing July 1, 2007, and
7 continuing until June 1, 2037, when all outstanding amounts are due and payable. The Note
8 provides that, in the event of default, the holder of the Note has the option of declaring all unpaid
9 sums immediately due and payable.

10 On or about May 9, 2007, the Debtors made, executed and delivered to Movant a Deed of
11 Trust (the "Deed of Trust") granting Movant a security interest in real property commonly described
12 as 512 -512 1/2 Washington Ave, Bakersfield, California 93308 (the "Real Property"), which is
13 more fully described in the Deed of Trust. The Deed of Trust provides that attorneys' fees and costs
14 incurred as a result of the Debtors' bankruptcy case may be included in the outstanding balance
15 under the Note. The Deed of Trust was recorded in the Official Records of Kern County, State of
16 California. A true and correct copy of the Deed of Trust is attached to the Exhibits as exhibit A and
17 incorporated herein by reference.

18 The obligation under the Note is in default as of April 1, 2008, for failure to make payments
19 to Movant. As of July 30, 2008, the total obligation due and owing under the Note is in the
20 approximate amount of \$202,843.89, representing the principal balance of \$196,000.00, interest in
21 the sum of \$6,371.34, late charges in the amount of \$321.55, recoverable fees in the amount of
22 \$85.00, and other fees in the amount of \$66.00. This is an approximate amount for purposes of this
23 Motion only, and should not be relied upon as such to pay off the subject loan as interest and
24 additional advances may come due subsequent to the filing of the Motion. An exact payoff amount
25 can be obtained by contacting Movant's counsel. Further, Movant has incurred additional post-
26 petition attorneys' fees and costs in bringing the instant Motion. Moreover, the total arrears under
27 the Note are in the approximate sum of \$6,779.80, excluding the post-petition attorneys' fees and
28 costs incurred in filing the instant Motion.

1 II.

2 **RELIEF FROM STAY**

3 **LACK OF EQUITY**

4 Movant is informed and believes that, based on the Debtors' bankruptcy Schedules and
5 Statements, the fair market value of the Property is approximately \$115,000.00. True and correct
6 copies of the Debtors' bankruptcy Schedules "A" and "D" are collectively attached to the Exhibits as
7 exhibit B and incorporated herein by reference.

8 Based on the above, Movant maintains that the equity in the Property is as follows:

Fair Market Value:	\$115,000.00
Less:	
Movant's 1 st Trust	\$202,843.89
Deed	
Costs of Sale (8%)	<u>\$9,200.00</u>
Equity in the Property:	\$<97,043.89>

13 As a result, there is no equity in the Property for the bankruptcy estate. Moreover, since this
14 is a Chapter 7 proceeding, there is no reorganization in prospect. As a result, Movant is entitled to
15 relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(2).
16

17 Debtors' Statement of Intent indicates it is the intent of the Debtors to surrender the Real
18 Property in full satisfaction of Movant's secured claim. A true and correct copy of the Debtors'
19 Statement of Intent is attached to the Declaration in Support of Motion for Relief From Automatic
20 Stay as exhibit C and incorporated herein by reference.

21 III.

22 **MOVANT IS ENTITLED TO RELIEF FROM THE**
AUTOMATIC STAY UNDER 11 U.S.C. § 362(d)(1).

23 **CAUSE - LACK OF ADEQUATE PROTECTION**

24 Pursuant to the provisions of 11 U.S.C. §§ 361 and 362(d)(1), Movant is entitled to adequate
25 protection of its interest in the Property.

26 Movant submits that adequate protection in this case requires normal and periodic cash
27 payments, as called for by the Note, plus the repayment of any and all delinquent amounts owed to
28 Movant, including all attorneys' fees and costs incurred in the filing of this motion.

1 Movant is informed and believes that Debtor are presently unwilling or unable to provide
2 adequate protection to the Movant and there is no probability that adequate protection can be
3 afforded to Movant within a reasonable time.

4 By reason of the foregoing, Movant is entitled to relief from stay under 11 U.S.C.
5 § 362(d)(1), based upon the failure of Debtors to provide adequate protection to Movant.

6 WHEREFORE, Movant respectfully prays for an Order of this court as follows:

7 1. Terminating the automatic stay of 11 U.S.C. § 362, as it applies to the enforcement by
8 Movant of all of its rights in the Real Property under the Note and the Deed of Trust;

9 2. That the 10-day stay described by Bankruptcy Rule 4001(a)(3) be waived;

10 3. Granting Movant leave to foreclose on the Real Property and to enforce the security
11 interest under the Note and the Deed of Trust, including any action necessary to obtain possession of
12 the Property;

13 4. Permitting Movant to offer and provide Debtors with information re: a potential
14 Forbearance Agreement, Loan Modification, Refinance Agreement, or other Loan Workout/Loss
15 Mitigation Agreement, and to enter into such agreement with Debtors;

16 5. Alternatively, in the event this court declines to grant Movant the relief requested
17 above, Movant requests that an Order for adequate protection be issued, requiring the Debtors to
18 reinstate and maintain in a current condition all obligations due under the Note and Deed of Trust
19 and all other deeds of trust encumbering the Real Property, including Debtors' obligations to pay
20 when due (a) the monthly installments of principal and interest, as required under the Note;
21 (b) tax/insurance obligations; and (c) any sums advanced by Movant on behalf of Debtors in order to
22 protect Movant's interest in the Real Property, including all attorneys' fees and costs incurred in the
23 filing of this motion;

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1 6. That the attorneys' fees and costs incurred by Movant for filing the instant Motion be
2 included in the outstanding balance of the Note as allowed under applicable non-bankruptcy law;
3 and

4 7. For such other and further relief as the court deems just and proper.

5 Dated: September 2, 2008

PITE DUNCAN, LLP

6
7 /s/ Christopher M. McDermott SBN 253411
8 CHRISTOPHER M. MCDERMOTT
9 Attorneys for NATIONAL CITY MORTGAGE CO.,
10 A DIVISION OF NATIONAL CITY BANK OF
11 INDIANA, its successors and/or assigns
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